APPENDIX

Opinion of Appellate Division, Fourth Department, 46 A.D.2d 216, 361 N.Y.S.2d 773

DONALD M. FISHER et al., Appellants, v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, Respondents. Appeal No. 1.

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Isabel Hurwitz, Deceased, Appellant, v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department.

Dec. 12, 1974.

Before:

MOULE, *J.P.*, and
CARDAMONE, SIMONS, MAHONEY and GOLDMAN, *JJ.*

PER CURIAM:

Appellants seek damages for the diminution in value of their properties and for the increased expense of maintaining them which they allege result from the acts of the City of Syracuse.

The properties are located within an area approved for urban renewal as a part of the City's General Neighborhood Renewal Plan. They were subsequently designated for acquisition by the Common Council. Although the plan was adopted more than 10 years ago, the properties have not been taken and it is claimed that substantial damage has resulted during the interim from this threat of condemnation. Special Term held that in the absence of a "taking" the appellants were not entitled to damages from

the City and dismissed the complaints for failure to state a cause of action (78 Misc.2d 124, 355 N.Y.S.2d 239). We affirm that decision (see Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240; City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895; and cf. opinion at the Appellate Division, 34 A.D.2d 24, 311 N.Y.S.2d 98). Furthermore, without an actual or *de facto* taking of the property the appellants are not entitled to be compensated for damages under the due process and equal protection clauses of the State and Federal Constitutions (see Sayre v. City of Cleveland, 6 Cir., 493 F.2d 64). The judgments should be affirmed.

Judgment affirmed without costs.

MOULE, *J.P.*, and CARDAMONE, SIMONS and MAHONEY, *JJ.*, concur.

GOLDMAN, *J.*, concurs in the following Opinion.

GOLDMAN, *Justice* (concurring):

I concur in affirmance but feel constrained to point out a a substantial wrong which has been visited upon appellants. The facts are not in dispute.

The properties owned by both plaintiffs are situated within a 101 block area within the City of Syracuse designated as the Syracuse Hill Neighborhood Development Program and there are over 1,600 individual parcels of land within the area. In 1962 the Syracuse Urban Renewal Agency, a Department of the City, commenced a comprehensive urban renewal study and made renewal plans for the area in question. The Common Council of the City approved an ordinance authorizing an application by the

City to the federal government for a planning grant for the urban renewal project. On September 12, 1966 the Common Council approved an initial partial acquisition of properties. On October 14, 1966 the City submitted a plan of acquisition for a portion of the renewal area, which plan included the property of appellant Bluman but did not include the property of appellants Fisher. Although the City has acquired title to many of the properties in the area, no proceeding has been commenced to condemn appellants' properties and no compensation has been paid to them.

Special Term found that:

> "It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions."

In furtherance of the plan many buildings were demolished and others were boarded up in the immediate area where appellants' properties are located. Appellants brought these actions to recover damage for the diminution in property values because of the "condemnation blight" and also for the increased expense of maintaining the properties during this long period of activity by the City. Although there was no "taking", appellants contend that the refusal to grant them "just compensation" is a denial of due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

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Special Term recognized the damages suffered by appellants and stated that the decision it must make was "harsh" in its effect on these property owners. Special Term felt bound, as we do, by Article I, section 7(a) of the State Constitution which specifically limits "just compensation" to property "taken". Our highest State court has clearly recognized this limitation in several decisions and particularly in City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904. No good purpose can be served by citation of the numerous Supreme Court decisions which deal with the question of "just compensation". Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 is supportive for the determination by Special Term. That case succinctly presents the limitations which constitutionally restrict compensation for "taking" stating, at page 285, 60 S.Ct. at page 236, that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. *They cannot be considered as a 'taking' in the constitutional sense*" (emphasis supplied). Special Term asserted that although it was "sympathetic to the plight of the plaintiffs * * * the principle of *damnum absque injuria* prevails". An eminent jurist of our State, Justice Howard T. Hogan, who has for many years presided almost exclusively over condemnation and appropriation cases, expressed my position on this principle when he wrote in Matter of County of Nassau [Lido Blvd.], 71 Misc.2d 554, 562, 336 N.Y.S.2d 566, 575 that "[t]he doctrine of *damnum absque injuria* to me has always been an immoral, illogical concept and should be declared illegal". It is of little comfort to tell these appellants that, "notwithstanding the

agreed fact that the City has dragged its heels for an inordinately long time (now ten years and into the indefinite future), you have been damaged but that damage is without wrong. True, your properties are now in a vast waste land, without tenants, neither desirable for residential nor commercial use, deteriorating daily but, unfortunately, under the present state of the law you have no recourse". This was the basis of our decision in City of Buffalo v. Clement Co., 34 A.D.2d 24, 28-32, 311 N.Y.S.2d 98, 102-107, which the Court of Appeals held (28 N.Y.2d 241, 257, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904, *supra*) is not the law in this State.

The sole purpose for this writing is the hope that the Legislature will consider the dilemma of these property owners, and literally hundreds of others similarly affected during these days of urban renewal, and will adopt legislation recommending amendment of our State Constitution. Substantially more than half of our sister states, among which are such significant jurisdictions as California, Illinois, Massachusetts and Pennsylvania, now make provision for compensation for property "taken or damaged". The New York State Constitutional Convention of 1967 proposed a new Constitution which contained in Article 1, section 7(a) the provision that "[P]rivate property shall not be taken or damaged, as such latter term is defined by law, without just and timely compensation". Since the refusal of the electorate to adopt the new Constitution, the Legislature has been taking action on these provisions on which there is a consensus as to their desirability. I respectfully suggest to the Legislature that the subject of this opinion is a matter which should be given prompt and favorable consideration.

Judgment Appealed From—Fisher Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #1

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, Deceased; ROSLYN MILLER; BERNICE GOLD and PHILIP ADLER,

Plaintiffs,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiffs, appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Judgment Appealed From—Fisher Case

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

ADJUDGED, that the defendants have judgment against the plaintiffs dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Judgment Appealed From—Bluman Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #2

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, Deceased,

Plaintiff,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiff appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above-entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

Judgment Appealed From—Bluman Case

ADJUDGED, that the defendants have judgment against the plaintiff dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Opinion of Special Term, Onondaga County, 78 Misc.2d 124, 355 N.Y.S.2d 239

DONALD M. FISHER *et al.*, *Plaintiffs* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants*.

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Israel Hurwitz, Deceased, *Plaintiff* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants*.

Supreme Court, Onondaga County

March 27, 1974

WILLIAM R. ROY, *Justice*.

The defendants in each of the above entitled actions have moved, pursuant to C.P.L.R. 3211 to dismiss the complaints on the ground that they fail to state a cause of action. Since both cases involve common questions of law and fact, this Court will consider them together.

In considering these motions to dismiss, the Court will apply the rules of liberal construction of the pleadings; Walkovsky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6; C.P.L.R. 3026; the acceptance as true of the material allegations of fact contained in the complaints and the truth of any reasonable inferences that may be drawn therefrom; Garvin v. Garvin, 306 N.Y. 118, 116 N.E. 2d 73; and that if any cause of action can be spelled out from the facts alleged, the motion must be denied, Dulberg v. Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695.

The facts giving rise to the instant litigation are without dispute. The plaintiffs in each action claim to be owners or parties in interest to real property situated within a 101 block area within the City of Syracuse and known as the

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Syracuse Hill Neighborhood Development Program. This is a designated urban renewal area and contains over 1,600 individual parcels of land.

Defendant, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department delegated by the City to carry out the functions vested in the Agency which was established pursuant to Article 15A of the General Municipal Law of the State of New York.

A brief review of the history of the Syracuse Hill Neighborhood Development Program will be helpful in the determination of these motions.

Beginning in 1962 comprehensive urban renewal plans were commenced in the form of a general neighborhood renewal plan in the area in question.

In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant in connection with the above urban renewal project and thereafter received such grant for the study. The properties owned by the plaintiffs in both of the above entitled actions were within the planning grant area.

On September 12, 1966, the Common Council of the City of Syracuse approved an initial partial acquisition for purposes of the plan.

On October 14, 1966, the City submitted a plan of acquisition for another part of the renewal area, which plan included the property of the plaintiffs, Bluman, in the second action. It is conceded that at no time was the property of the plaintiffs in the first action ever included within the plan.

In June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood

Renewal Plan to Neighborhood Development Plan and this was approved by the Common Council of the City on June 22, 1969. It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions.

In implementing the foregoing plans and authorizations the defendants have acquired title to many parcels located within the urban renewal area and to several parcels in each of the blocks located within the City, in which the plaintiffs' properties are located. Many buildings have been demolished in furtherance of the plan and others have been boarded up.

The plaintiffs, feeling aggrieved as a result of the action of the City and the Agency, commenced these actions by a summons and complaint dated October 5, 1973.

In each of the complaints the history of ownership of the property is alleged and the activities of the City and the Agency as set forth above were outlined.

The complaints in each action contain similar allegations with respect to the activities of the City. Both of the complaints contain the following paragraphs:

> "As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiff's property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both

residential and commercial tenants have moved from the area, the plaintiff has lost substantial amounts of rental income, he has been placed in a special insurance pool which has forced him to pay excessive premiums, he has been compelled to expend monies to protect the property from vandalism, and his property has been drastically reduced in value."

"By reason of the foregoing the plaintiff has been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution."

In the Bluman complaint there is an allegation that the property was designated for acquisition but that no proceedings were commenced to condemn the property, nor was any step taken to compensate the Blumans for the damage allegedly sustained by them.

The Fisher complaint contains an allegation to the effect that although their property was in the urban renewal area, no proceedings have been commenced to condemn the property nor has anything been done to compensate plaintiffs in that action for the damage allegedly suffered by them.

Thus, the only difference between the two actions is that in the Bluman case the property was designated for condemnation, but has not as yet been taken and in the Fisher case the property was not designated for condemnation.

It is the plaintiffs' contention, in both actions, and, as appears by the complaints, that as a result of the actions of the defendants, the vicinity of the plaintiffs' property

has suffered a "condemnation blight". This, they allege, has transformed the area into one which is highly undesirable for either residential or commercial purposes; it has become a high crime rate area where vandalism is rampant and where it is not safe to live or work. Plaintiffs further allege that tenants have moved from the area, resulting in loss of rental income. Further, plaintiffs claim that they have been forced to pay excessive insurance premiums and that they have been compelled to expend monies for the protection of their property from vandalism and that the properties have been reduced in value.

The plaintiffs contend that they should be compensated, because of the so-called condemnation blight, for loss of income from the properties, depreciation in value, and additional costs incurred in protecting the property from vandalism, as well as increased insurance premiums. They contend that the actions of the defendants amount to a constitutional deprivation of due process and equal protection of the laws pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

It is important to point out that in both of these actions the plaintiffs are not claiming that the defendants have *taken* their property, either by *de jure* or *de facto* (inverse) condemnation. Nor do they seek to compel the defendant to condemn the properties. As this Court reads the complaints, the plaintiffs claim that they should be compensated for damages sustained by them as a result of the activities of the defendants in creating what is referred to as a "condemnation blight" in the vicinity of their properties.

In order to understand and properly evaluate the complaints of the plaintiffs, it is necessary to examine the law in connection with condemnation and appropriation. As

was stated in City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241 at pg. 255, 321 N.Y.S.2d 345 at pg. 357, 269 N.E.2d 895 at pg. 903, ". . . 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding." It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking in condemnation, *de jure* or *de facto*.

The Fifth Amendment to the U.S. Constitution provides, as pertinent to this decision, ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment, so far as is pertinent to this decision provides, ". . . nor shall any State deprive any person of life, liberty or property, without due process; . . .". Article 1, § 6 of the New York State Constitution provides, as far as is pertinent to this decision, as follows: ". . . no person shall be deprived of life, liberty or property without due process of law."

It is in light of these provisions of the Federal and State Constitutions and upon the case law that we must determine whether the actions of the defendants, although concededly not constituting a "taking" of property in its accepted legal sense, i.e., *de facto* or *de jure* appropriation, give rise to a cause of action for diminution in property values and increase in costs of maintenance and protection of those properties.

The Fifth Amendment provides the basis for compensation for property taken for public use. This provision refers only to direct appropriations. Laycock v. Kenney,

9 Cir., 270 F.2d 580, cert. den. 361 U.S. 933, 80 S.Ct. 373, 4 L.Ed.2d 355 (1960), and was never supposed to have any bearing upon or inhibit laws that indirectly work harm and loss to individuals. Knox v. Lee, 79 U.S. 457, 20 L.Ed. 287 (1870).

Furthermore, as was stated in Danforth v. United States, 308 U.S. 271 at pg. 285, 60 S.Ct. 231 at pg. 236, L.Ed. 240 (1939), "... a reduction or increase in the value of property may occur by reason of legislation for or the beginning or a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

It thus can be seen that under the Federal law the actions of the defendants do not amount to a "taking". Inasmuch as these acts do not amount to a "taking", under the Federal law, then there can be no deprivation of constitutional due process. Danforth v. United States, *supra.*

In the landmark New York case of City of Buffalo v. Clement Co., *supra,* 28 N.Y.2d at pg. 257, 321 N.Y.S. at pg. 359, 269 N.E.2d at pg. 904, Judge Scileppi, after a review of authorities, stated the policy of the State of New York is:

> "... to deny recovery in the absence of a substantial impairment of claimant's right to use or enjoy the property at any time prior to the date of final appropriation. Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation."

In addition, the Court of Appeals of the State of New York has previously stated: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation . . . or give him any right of action." Sauer v. City of New York, 180 N.Y. 27, 32-33, 72 N.E. 579, 580, aff'd 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176.

Assuming the allegations of the complaints to be true, there is no question that the plaintiffs in each of the above entitled actions have suffered damages. It may very well be that the damages that the plaintiffs would be able to prove might far exceed the fair market value of the properties to which the owners might be entitled in condemnation proceedings. However, the mere fact that someone has suffered damage does not give rise to a cause of action, unless the cause of action has a legal basis. The items of damages alleged by the plaintiffs were not actually taken by the defendants. They are not "property" within the contemplation of the eminent domain clauses of the Federal or State Constitutions.

This Court is unable to find any case, Federal or State, which supports the theory upon which plaintiffs base their cause of action.

Plaintiffs, in their brief, cite the case of Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), in support of their position. That case involved the interpretation of a Statute which purported to limit the amount of rental loss which might be recovered in a condemnation case. The Court held in that case that the Statute was un-

constitutional insofar as it limited compensation for rental loss, stating that ". . . one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of Article 1, sec. 13, Wis.Const. sec. 32.19(4), Stats. . . .".

What the Court was determining in that case was that once you have determined what is "just compensation", any attempt to limit that "just compensation" would be unconstitutional.

The other cases cited by the plaintiffs in their brief involve instances of either *de jure* or *de facto* appropriation and did not involve the precise question here presented for determination by this Court. The case of Levine v. City of New Haven, 30 Conn.Sup. 13, 294 A.2d 644 (1972), cited by the defendant, involved a complaint which the Court determined to be one for inverse condemnation (a *de facto* taking). The case thus involved the question of whether the acts of the City of New Haven constituted a "taking" in the constitutional sense. That case differs from the above captioned cases in that there is no claim by either plaintiff that the acts of the defendants constitute a "taking".

It might be pointed out that once it has been determined that a "taking" has occurred, then all of the rights of the plaintiffs to constitutional due process must be observed. This necessarily involves notice to the property owner and an opportunity for him to be heard on the question of "just compensation".

Prior to a determination that property has been taken within the constitutional sense, that is by a direct appropriation, Laycock v. Kenney, *supra,* be it *de jure* or *de facto,* there is no constitutional deprivation of due process.

Danforth v. United States, *supra;* City of Buffalo v. Clement Co., *supra.*

Although the Court is sympathetic to the plight of the plaintiffs in these cases, it finds no constitutional or case authority in support of the causes of action alleged in the complaints. As harsh as it may be, the principle of *damnum absque injuria* prevails, and the complaints in each of the above entitled actions are, accordingly, dismissed on the ground that they fail to state a cause of action.